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CONCORD, N.H.

Mr. Walter C. White, Chairman  
Water Resources Board  
State House Annex  
Concord, New Hampshire

Dear Mr. White:

This is in reply to your letter of February 6, 1958, in which you requested the opinion of this office on three questions of law with respect to the maintenance, ownership and operation of the outlet dam in Lakeport, New Hampshire which is to be acquired by The State of New Hampshire acting through the Water Resources Board.

Your first question is whether or not there is any statute which prohibits the Water Resources Board from carrying public liability insurance on the dam. To this question we reply in the affirmative. We direct your attention first to RSA 9:27 which provides as follows:

"The funds of the state or any department or institution thereof shall not be used for providing for insurance of property owned by the state against loss by fire or other casualty or against claims by third parties; provided, however, that such insurance as may be specifically authorized by law shall be carried, and such insurance as may be approved by the governor and council shall be carried on elevators and high pressure steam boilers with a safety valve setting in excess of fifteen pounds pressure, in connection with inspection." [Underlining added]

Our Supreme Court has stated that "[t]he [Water Resources] Board is a branch of the executive department of the State government" and that "[a]s a state agency it stands on the same footing as any unincorporated administrative bureau." St. Regis Paper Co. v. New Hampshire Water Resources Board, 92 N.H. 164, 166, 167. In view of this language it is our opinion that the provisions of RSA 9:27 are applicable to the Board and that the Board has no authority to carry liability insurance unless "specifically authorized by law". We have carefully examined RSA 431, which creates the Water Resources Board and defines its powers, and all amendments thereto, and find no specific authorization for the purchase of liability insurance such as that given to the Forestry and Recreation Commission to purchase liability insurance for the

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Cannon Mountain Aerial Tramway (RSA 227:2) and the Mt. Sunapee Aerial Tramway (RSA 227:10). Accordingly it is our opinion that under existing statutes the purchase of liability insurance by the Water Resources Board would be an unlawful use of State funds.

Your second question is whether or not the Board can be held liable in tort for negligence in the ownership, maintenance and operation of the dam. To this question we must give a qualified answer. It is well established that the State cannot be sued in the absence of a statute authorizing it, or without its consent, either expressly given or clearly implied. Klinger v. Cartier, 96 N.H. 181, Bow v. Plummer, 79 N.H. 23, 24. See also St. Regis Co. v. Board, 92 N.H. 164, 168, and authorities cited. RSA 481:6 provides in part that the Water Resources Board is liable to suit "in the same manner as a private corporation" and this language raises the question as to what extent, if any, the State has waived its sovereign immunity from suit. In the St. Regis case, supra, at page 166, the Court answered this question by saying:

"While the Board is liable to suit 'in the same manner as a private corporation,' the extent of liability is far short of that of general private liability, and is limited to such as is thought to be in furtherance of the execution of a project. So far as liability may tend to defeat the objectives of the legislation, it is not imposed by the provision for suits against the Board. As a general governing rule of demarcation, private liability inheres for the Board's contracts duly entered into and for wrongful conduct in the performance of its functions and projects, but not for the plans and undertaking of a project within its authority and approved and directed by the Governor and Council."

The question of the Board's responsibility to suit was also given consideration by the Federal District Court for the District of New Hampshire in the case of Northern New Hampshire Lumber Company v. New Hampshire Water Resources Board (1944), 56 Fed. Supp. 177, wherein the following language appears:

"The agreement is advanced by the plaintiff that when the New Hampshire Legislature created the Water Resources Board and made it a corporation with authority to sue and be sued, the state thereby agreed to be sued. I construe this to mean, that if the Board was guilty of any misfeasance or nonfeasance, action might be brought against it and its members might be individually liable but no judgment against it would subject the State's property to seizure to satisfy such a judgment."

In answer to your second question it is our opinion that while the State cannot be held liable in tort for the negligence of the Board in the maintenance or operation of the Lakeport Dam, the members of the Board may be held individually liable for their own "misfeasance or nonfeasance" in the mainten-

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ance or operation of said dam. Misfeasance means the "improper performance of some act which a man may lawfully do." Black's Law Dictionary Fourth Edition, page 1151. Nonfeasance means "nonperformance of some act which ought to be performed, omission to perform a required duty at all, or total neglect of duty." Black's Law Dictionary, supra, page 1208. In any given case the question of whether or not the members of the Board have been guilty of misfeasance or nonfeasance is a question of fact to be determined by the Court or jury, whichever is the trier of facts.

Your third question is whether or not the dam or the revenues the State will receive on account of the dam which will be pledged to secure the bonds which the Board will issue to finance the acquisition of the dam can be taken on execution in a tort judgment. Our answer to this question is in the negative. Your attention is directed to RS. 481.6 which provides in part that

"All property of the corporation and all property held in the name of the state pursuant to the provisions hereof shall be exempt from levy and sale by virtue of an execution, and no execution or other such judicial process shall issue against the same. No judgment against the corporation shall be a lien upon its property or the property held in the name of the state pursuant to the provisions hereof."

As the Court said in St. Regis Case, supra, at page 177, "this exemption from processes to enforce liability is expressed clearly and forceably."

If you have other specific questions concerning the Lakeport project please feel free to communicate with us further.

Very truly yours,

George T. Ray, Jr.  
Assistant Attorney General

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